

1 **BEFORE THE POLLUTION CONTROL HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 **DAN PARISEAU,**)
4 Appellant,) PCHB NO 92-142
5 v.) **FINAL FINDINGS OF FACT,**
6 **STATE OF WASHINGTON,**) **CONCLUSIONS OF LAW**
7 **DEPARTMENT OF ECOLOGY,**) **AND ORDER**
8 Respondent.)
 _____)

9 The Pollution Control Hearings Board ("Board") heard this matter on June 22, 1993 in
10 Lacey, Washington. The Board was comprised of, Harold S. Zimmerman, Chairman,
11 Robert V. Jensen, attorney member, and Richard C. Kelley, member. Chairman Zimmerman
12 retired from the Board on July 30, 1993, before an opinion could be drafted, and therefore,
13 did not participate in the decision. Robert Jensen was appointed the Presiding Officer by
14 Chairman Zimmerman, subsequent to the hearing. Appellant, Dan Pariseau, ("Pariseau") was
15 represented by attorney Patrick J. Morrissey. Respondent, Department of Ecology
16 ("Ecology") was represented by Assistant Attorney General, Mark Jobson. Kim Otis, court
17 reporter, affiliated with Gene S. Barker and Associates of Olympia, recorded the proceedings.

18 The Board heard testimony of sworn witnesses, reviewed all the exhibits and briefs
19 submitted by the parties. Based thereon, the Board makes these:

20 **FINDINGS OF FACT**

21 **I**

22 Pariseau, on March 6, 1990, submitted to Ecology an Application for Permit to
23 Appropriate Public Waters of the State of Washington. The permit was not accompanied by a
24 filing fee, nor has one been received by Ecology for this application. Ecology accepted the
25 application and made public notice thereof. On the application is written a priority date of
26

27 **FINAL FINDINGS OF FACT,**
 CONCLUSIONS OF LAW AND ORDER
 PCHB NO 92-142

1 March 12, 1990. No protests were received to the application within the 30 day protest
2 period
3

4 II

5 Pariseau, in the application, requested permission to appropriate surface from the
6 Columbia River, for the purposes of irrigating 500 acres of land, lying within an ownership
7 comprising approximately 1000 acres of land. The application does not identify the location of
8 the 500 acres proposed to be irrigated. The application lists Pariseau both as co-owner with
9 his father, and lessee of the lands to be irrigated. Pariseau owns 100 of the acres, his father
10 owns the rest. The lands lie within the Colville Indian Reservation

11 III

12 The applicant requested 5000 gallons per minute, which is equivalent to 11.1 cubic feet
13 per second. He did not fill out that portion of the application which asks how many acre-feet
14 per year are being requested for irrigation. Applicants generally leave this portion of the form
15 blank. Ecology typically fills it in, based on location, crop requirement, and what applicant
16 requests.

17 IV

18 Pariseau also filled out and filed with Ecology an environmental checklist, which is
19 dated March 5, 1993. In the checklist, Pariseau stated that the application "covers an
20 agricultural project which will expand up to 500 acres as time permits". The checklist
21 estimated the beginning and ending of the project as March 15, 1990 and Spring 2000,
22 respectively
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V

The reason for requesting 500 acres, according to Pariseau, was because that was his understanding of the amount of acres of apples he estimated, at that time, could be harvested from these lands

VI

Kevin Brown, an Ecology water right permit writer, made an inspection of the site on September 27, 1991. At that time, approximately 60 acres of orchard were in production on the property. The remaining property was covered with native vegetation. The source of the diversion from the Columbia River was in place, and contained a pump which pushes water up to the orchard on the bluff above

V

Ecology, on December 20, 1991, closed the Columbia River to further appropriations, under WAC 173-563-015.

VI

In calculating the amount of acre-feet per year for irrigation, Ecology consults the State of Washington Irrigation Guide. That document estimates the water duty for irrigation in the area of the application to be four acre-feet per year per acre. This assumes a 75 percent efficiency of application. Based on this data, Ecology calculated that it would require 2000 acre-feet per year to irrigate 500 acres, from April 1 to October 31. In addition, 88 acre-feet per year would be required, from March 1 to April 30, for frost protection.

VIII

Therefore, on June 17, 1993, Ecology granted Pariseau a permit to appropriate 2088 acre-feet per year to irrigate 500 acres and provide frost protection. Ecology determined that the proposal to irrigate for apples was a beneficial use of the water, that it would not impair

1 existing rights nor would it impair the public interest. Ecology set May 1, 2005, as the
2 deadline for putting the water to full beneficial use.

3 IX

4 Pariseau, in June 1990, subsequent to Ecology's issuance of the permit, requested
5 Ecology to amend his permit for an undetermined total acreage and quantity of water
6 Ecology, on June 30, 1993, offered to change the priority date to a time after closure of the
7 river. Pariseau requested that such a change not be made.

8 X

9 Pariseau, through his attorney, wrote a letter dated, July 14, 1993 to Ecology,
10 requesting deletion of the 500 acre limitation. No request was made to increase the quantity of
11 water for the intended use. The letter urged Ecology to make the change before the appeal
12 period expired.

13 XI

14 Ecology responded orally, on July 15, 1993, that it would not delete the 500 acre
15 limitation from the permit. Pariseau filed a timely appeal with the Board on July 20, 1993.
16 He requests that the matter be remanded back to Ecology, and that Ecology treat his July 14
17 letter as an amendment to the original permit application, with the priority date of that
18 application.

19 XII

20 At the hearing, Pariseau testified that he believes much more than 500 acres can be
21 irrigated with the 2088 acre-feet per year granted under the permit. He believes that this can
22 be accomplished by changing the topography of the land, through "land contouring." He did
23 not present this concept to Ecology, during the review of his application.

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XIII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such
From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I

The Board has jurisdiction over this matter. RCW 43 21B.110(1)(c).

II

Pariseau seeks to have the Board order Ecology to amend his application. However he failed to file an amendment, on the forms required by Ecology under WAC 508-12-180, prior to the issuance, by Ecology of the permit. Any amendment, at this time, therefore, necessarily would be of the permit, rather than of the application.

III

RCW 90 03 380, authorizes Ecology to grant a transfer of a water right to other land, if the change can be made without detriment to existing rights. Such a transfer cannot be accomplished, until public notice has been given pursuant to RCW 90 03 280. WAC 508-12-190(1) allows applicants or permittees to seek amendment of their application or permit, provided they utilize the procedure set forth in RCW 90 03.380. WAC 508-12-190(2) authorizes amendment to any permit without affecting priority, "only after full consideration of the proposed changes in accordance with the provisions of RCW 90 03 290" Thus the relief which Pariseau seeks, amendment of his permit, is only available to him by applying under RCW 90 03 380. This is the proper procedure to be followed and would lead to a further determination by Ecology

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IV

RCW 90 03.290, requires Ecology to make a threshold determination of what water is available for appropriation. Here, the Columbia River, the source of the water, has been closed to further appropriation. WAC 173-563-015(2)-(4).¹ Any examination by Ecology of available water for an amendment to the permit, would undoubtedly conclude that there is currently no more water available to Pariseau. This however, should not be a barrier, however, to an application to change the place of use.

V

RCW 90 58.290 also requires Ecology, where the proposal is for irrigation, to "investigate, determine and find what lands are capable of irrigation by means of water found available for appropriation". We do not believe it appropriate to interpret this language, until Ecology has had an opportunity, to fully review the plans of Pariseau: in particular his concept for water conservation through changing the topography of the land, under a properly filed and published amendment to the permit.

VI

We also decline at this time to consider what ramifications, if any, the proposal may have under review of the policies of the Water Resources Act of 1971 (RCW 90.54), in particular RCW 90 54 020(6); or under the State Environmental Policy Act ("SEPA," RCW 43 21C)

¹ We note that the regulation is stated in terms of "applications" filed before December 20, 1991. Here the application, which was accepted, despite the fact no fee had been paid, was acted on by Ecology before any attempt was made to amend the application. Accordingly, the regulatory grandfathering in of applications is of no benefit to Pariseau, because his application had turned into a permit.

VII

Any Finding of Fact deemed a Conclusion of Law is hereby adopted as such. From the foregoing, the Board issues this


ORDER

1. Ecology's permit granting Pariseau authority to appropriate 2088 acre-feet of water per year from the Columbia River, for the beneficial use of irrigating 500 acres of land is affirmed.

2. Pariseau's appeal seeking an order that Ecology treat his July 14, 1993 letter as an amendment to his application for an appropriation permit is denied

DONE this 8 day of ~~August~~^{Sept} 1993

POLLUTION CONTROL HEARINGS BOARD


ROBERT V. JENSEN, Presiding Officer


RICHARD C. KELLEY, Member

P92-142F